No. 93-1525

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MICHAEL A. LEBRON,

Petitioner,

—v.—

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK),

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR PETITIONER

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REPLY MEMORANDUM FOR PETITIONER

In its brief in opposition, the National Railroad Passenger Corporation ("Amtrak") seeks to paint this case as just another in a long line of cases finding that Amtrak and Conrail are not state actors for purposes of routine personnel decisions. But those cases challenged decisions made without the involvement of government appointees. Mr. Lebron challenges a policy suppressing political speech that was expressly adopted by government appointees. In its effort to shoehorn this case into the line of employment decisions, Amtrak repeatedly misrepresents a critical fact: the policy challenged here was adopted by Amtrak's Board, eight of whose nine members are Presidential appointees. When that fact is considered, the court of appeals' decision is revealed to be not in line with the prior employment cases, but out of line with fundamental state action principles: it treats the conduct of direct government appointees as non-state action.

In addition, Amtrak misrepresents the rationale of the court of appeals in an attempt to sidestep two significant inter-circuit conflicts. The Second Circuit could not have reached the result it did in this case—holding that a policy adopted by government appointees is not state action—without applying a higher state action threshold to First Amendment claims, a double standard rejected by other circuits. And its holding is also contrary to those circuits that have held that action taken by a Board controlled by a majority of government appointees is state action.

I. THE FACT THAT AMTRAK'S GOVERNMENT-APPOINTED BOARD EXPRESSLY APPROVED THE POLICY AT ISSUE IN THIS CASE DISTINGUISHES THIS CASE FROM ALL OTHER AMTRAK AND CONRAIL CASES

The most significant (and oft-repeated) misrepresentation in Amtrak's brief is its contention that Amtrak's government-appointed Board played no role in the policy challenged here. For example, Amtrak states that "there is no evidence that Amtrak's board had any involvement in the formulation of Amtrak's policy against political advertising on the Spectacular. . . . Petitioner's argument that it did is without the slightest support in the record."[1] That contention is necessary to Amtrak's argument that this case is indistinguishable from the Amtrak and Conrail employment cases, because those cases emphasized that government appointees had no responsibility for the challenged personnel decisions.[2]

[1] Br. in Opp. 17 n.10; *see also id.* at 5 ("there is nothing to suggest that the board even knew about the decision or the policy that prompted it"); *id.* at 13 ("there is no evidence that Amtrak's board played any role in creating or implementing Amtrak's advertising policies"); *id.* at 17 ("The federal government simply played no role whatsoever in these decisions.").

[2] *See, e.g. Myron v. Consolidated Rail Corp.*, 752 F.2d 50, 54 (2d Cir. 1985) (despite government involvement with Conrail, "there is nothing resembling federal supervision of day-to-day activities . . . so that its personnel decisions can be considered federal action"); *Anderson v. National R.R. Passenger Corp. (Amtrak)*, 754 F.2d 202, 204 (7th Cir. 1985) ("no allegation that the government is involved with Amtrak's personnel policies or decisions"); *Marcucci v. National R. R. Passenger Corp.*, 589 F. Supp. 725, 728 and n.3 (N.D. Ill. 1984) ("no [federal] regulation or policy [ ] could have caused [plaintiff's dismissal]").

In fact, however, the record demonstrates that Amtrak's Presidentially-appointed Board explicitly adopted the policy against political advertising at issue here. The policy that Amtrak's Anthony DeAngelo relied upon in rejecting Mr. Lebron's advertisement—and which the district court struck down—was expressly adopted by Amtrak's Board in 1980 (C.A. App. 345; DeAngelo Dep. 104-05; E31). That policy, contained in a leasing contract with Amtrak's leasing agent, barred advertising that

> in [Amtrak's] judgment, may be unlawful, immoral, improper or offensive to good taste, . . . or involve political or other views which could result in dissension or involve [Amtrak] in dissension, complaints or controversy with its patrons or the public or involve matters or ramifications not now anticipated or foreseeable.

(E31; E42, ¶ 27). In 1985 and 1991, the Board approved even broader contract language authorizing Amtrak to disapprove any advertising that "may be considered objectionable by Amtrak" (C.A. App. 345; DeAngelo Dep. 104-05; E2; E5, § 6, E13, § 31; E19-20, §§ 4, 7; E444-45; E1039-45), but DeAngelo testified that the policy adopted in 1980 continued to apply and formed the basis for his decision in Mr. Lebron's case (C.A. App. 107, 345, 349-50, 383, 407).[3] Thus, contrary to respondent's contention, the record unequivocally shows

[3] DeAngelo stated that the standards applied were "contained in the arrangements we have with TDI and there has [sic] been several of those over the years and it would be the language stated in there." C.A. App. 350. According to DeAngelo, those standards called for advertising that was "not pornographic, and not objectionable to our riding public and others associated with us including political and other types of potentially controversial matters" (C.A. App. 349).

that the Board itself expressly adopted the policy challenged here.

The fact that Amtrak's Board—eight of whose nine members are Presidential appointees[4]—adopted the challenged policy distinguishes this case from every other Amtrak or Conrail state action case cited by respondent. Those cases simply hold that where government appointees are not involved in challenged conduct, the conduct is not state action. Thus, for example, in *Myron v. Consolidated Rail Corp.*, 752 F.2d 50 (2d Cir. 1985), the Second Circuit stressed that Conrail's Board was *not* involved in the employment dispute at issue, and in any event consisted of a majority of non-government appointees. *Id.* at 54. It is one thing to say that a routine personnel decision, made without any input from government appointees, is not state action. It is another matter entirely to hold that a policy expressly adopted by Presidential appointees is not state action.

Amtrak's misrepresentations regarding the Board's makeup and responsibility for the policy are also necessary to its argument that the court of appeals' decision is consistent with this Court's decisions in *Blum v. Yaretsky*, 457 U.S. 991 (1982), *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), and *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522 (1987). *Blum* and *Rendell-Baker* held that independent contractors are not state actors simply because they do a lot of business with the government and are subject to

[4] Amtrak also misrepresents the extent of government control of its Board. It inexplicably claims that only "five of the nine board members are appointed by the President," Br. in Opp. 17 n.10. By statute, however, the President appoints eight of the nine members, and the ninth is selected by the eight Presidential appointees. 45 U.S.C. § 543. Respondent attempts to mask this reality by noting, for example, that "two board members are selected by the preferred stockholder," Br. in Opp. 3, but it does not dispute that the only preferred stockholder is the United States, *id.* at 2. Amtrak also argues that several Board members are "private individuals closely associated with the railroad industry," Br. in Opp. 3, but that does not diminish the significant fact that they owe their appointment and allegiance directly to the President of the United States.

general government regulations. But the hospital in *Blum* and the school in *Rendell-Baker* were indisputably private entities—unlike Amtrak, the government did not wholly own their voting stock, appoint their boards, control the disposition of their property, or directly subsidize their losses. Had the government exercised such control, *Blum* and *Rendell-Baker* would undoubtedly have come out differently.

Similarly, as noted in Mr. Lebron's petition, the Court in *San Francisco Arts & Athletics, Inc.* explicitly justified its decision by noting the absence of *any* government control over the United States Olympic Committee's decisions. Pet. 21-22. Here, by contrast, government appointees adopted the very policy Mr. Lebron challenges. This Court has never held that a government appointee's conduct is not state action.

Thus, Amtrak's brief in opposition is predicated on a central misrepresentation of fact concerning the Board and its direct responsibility for the policy challenged here. The court of appeals' holding that a policy adopted by a Board of Presidential appointees is not state action is flatly inconsistent with this Court's precedents and the decisions of several other circuits.[5]

[5] *See infra* Section III. Amtrak's brief contains several other significant misrepresentations. For example, it labels as "completely false" Mr. Lebron's assertion that Amtrak has displayed other political advertisements in Penn Station. Br. in Opp. 4 n.3. But it is undisputed that immediately in front of the Spectacular stands an advertisement for *Plain Truth* magazine, a free fundamentalist magazine that addresses political and social issues—including homosexuality, the holocaust, and the rise of the European Community—from a conservative religious perspective. Pet. 20b; C.A. App. 634-35, 995-97; E346; E202-35; E1144-75; Haut Dep. 56.

In addition, respondent asserts that "Amtrak, not the federal government, owns New York City's Penn Station." Br. in Opp. 3. But it is undisputed that the government-appointed Board controls all disposition of Amtrak's property, including Penn Station. C.A. App. 345. In addition, the federal government purchased Penn Station for Amtrak, and holds the mortgage on it. Pet. App. 9b; SE2407, SE2419; E425; E453-54; E472; E958-66.

II. AMTRAK CONCEDES THAT THERE IS A SPLIT IN THE CIRCUITS ON WHETHER A HIGHER STATE ACTION THRESHOLD MUST BE MET FOR FIRST AMENDMENT THAN FOR EQUAL PROTECTION CLAIMS

Amtrak does not deny that there is a genuine split in the circuits regarding whether the same state action analysis applies to First Amendment and Equal Protection claims. Nor does it dispute that the Second Circuit stated in this case that a stronger state action showing is required for First Amendment claims. It also does not dispute that the Second Circuit's double standard is the minority view, contrary to explicit holdings of four circuits and implicitly contrary to the analysis used by five other circuits and this Court. Instead, Amtrak argues that the court of appeals' decision did not rest on the reasoning the court expressly put forward as a justification for its decision. Br. in Opp. 11.

Amtrak's contention is belied by the court of appeals' own language. In the middle of explaining its reversal of the district court's state action finding, the court held that "a less stringent standard for finding state action should be applied when racial or sexual discrimination is at issue, as is so often the case in employment litigation, than when there is a claim of a First Amendment violation." Pet. App. 10a. That holding was critical to the panel majority's rejection of then-District Judge Leval's (and dissenting Circuit Judge Newman's) conclusion that the Amtrak employment cases were distinguishable because they did not implicate the kind of First Amendment concerns raised by suppressing political expression in Penn Station. The court reasoned that because in its view less state involvement need be shown for a discrimination claim, the fact that employment discrimination claims against Amtrak did not satisfy state action meant *a fortiori* that Mr. Lebron's First Amendment claim could not satisfy state action. *Id.*

Application of this higher state action threshold was critical to the panel's result, because under controlling Second

Circuit precedent, the facts presented in this case would have been sufficient to establish state action in a race discrimination case. In *Jackson v. Statler Found.*, 496 F.2d 623, 634-35 (2d Cir. 1974), the court held that government appointment of a majority of an entity's board, with any other significant evidence of state action, would warrant a finding of state action *where the less stringent state action standard applicable to discrimination claims applied.* The evidence of state action here includes not only majority control of the Board, but sole ownership of voting stock, 24 years of direct federal subsidies of Amtrak's operating expenses, government purchase of the property in dispute, and intermingling of the property with numerous other government entities. Thus, the court of appeals' decision can be squared with its own decision in *Jackson only* by virtue of the higher state action showing it required for Mr. Lebron's First Amendment claim.

The court of appeals' holding therefore rests squarely on a state action analysis that expressly conflicts with four circuits and implicitly conflicts with the state action analysis used by this Court and five other circuits.

III. AMTRAK'S BRIEF UNDERSCORES THE CONFUSION IN THE LOWER COURTS REGARDING THE SIGNIFICANCE OF GOVERNMENT APPOINTMENT OF AN ENTITY'S BOARD TO STATE ACTION ANALYSIS

Amtrak maintains that the second split in the circuits that Mr. Lebron identified—regarding the significance of government control of an entity's Board to the state action inquiry—is based on a "mischaracteriz[ation of] the law of the other circuits." Br. in Opp. 12. If anyone is guilty of mischaracterization on this issue, it is Amtrak. In fact, the cases demonstrate not only a split, but utter confusion among the lower courts.

Amtrak argues that the Sixth Circuit has rejected its own earlier view that the presence of a majority of governmental appointees on an entity's Board establishes state action, cit-

ing *Crowder v. Conlan*, 740 F.2d 447 (6th Cir. 1984). Br. in Opp. 12-13. But Amtrak overstates *Crowder*'s holding. In that case, a doctor challenged a private hospital's decision to restrict his staff privileges. The hospital's 13-member board included two government officials and eleven private members. While the court stated that the "legal reasoning" of three earlier cases finding state action based on government appointment of board members "is no longer valid in light of the Supreme Court's recent holdings," 740 F.2d at 452, it did *not* hold that government appointment of a *majority* of a private entity's board is irrelevant. Instead, it expressly distinguished the earlier cases by noting that "in each of those cases a majority of the members of the hospital's governing board were accountable to the public," whereas in *Crowder*, only a small minority (two) of the thirteen board members "were responsible to the public." *Id.* Moreover, the Court expressly stated that government representation on the board was "an important factor in establishing state action," and cited with approval *Downs v. Sawtelle*, 574 F.2d 1, 8 (1st Cir.), *cert. denied*, 439 U.S. 910 (1978), which found state action where the town appointed all of a hospital's board of directors. *Id.* at 451.[6]

Thus, the Sixth Circuit itself seems confused regarding the significance of government appointment of the members of a private entity's board. As noted in Mr. Lebron's petition, the confusion is even greater across the circuits. Pet. 16-18. Yet

[6] *See also Adams v. Vandemark*, 855 F.2d 312, 317 (6th Cir. 1988) (stating that "[p]erhaps the strongest indication of a symbiotic relationship between [a private corporation] and [a city] is that state law requires one-third of [the corporation's] board of directors to be public officials," but finding no state action where board not involved in challenged personnel decision), *cert. denied*, 488 U.S. 1042 (1989).

The Sixth Circuit in *Crowder* also relied on the fact that the challenged restriction of privileges was in fact the decision of four private medical committees, and not an independent decision of the board. *Id.* at 451-452. Here, by contrast, the Board has exclusive authority over disposition of Amtrak property, and explicitly adopted the policy against political advertising that Lebron challenges.

we are aware of *no* other decision in which any court has found that an entity whose board is comprised of a majority of governmental appointees is not a state actor for purposes of a direct challenge to a policy adopted by the government-appointed board.

* * *

The court of appeals' decision here—holding that a policy expressly adopted by a board whose members are virtually all government appointees is not state action where challenged on First Amendment grounds—goes beyond any other previous state action decision of this Court or any other circuit. It cannot be squared with the prior Amtrak cases, which all emphasized the *absence* of government appointees' involvement in the challenged decisions. Its express reasoning conflicts with the prevailing view in this Court and most of the circuits that the same state action analysis applies to First Amendment and Equal Protection Clause claims. And it conflicts with the decisions of those circuits that have found government appointment of a majority of a board to be a significant or determinative factor in the state action inquiry.

If the court of appeals' decision is correct, Amtrak's Presidentially-appointed Board is free as a constitutional matter to decide that it will sell its valuable advertising space only to contributors to the Democratic Party, or only to advertisers who espouse conservative viewpoints (such as *Plain Truth* magazine). If the court of appeals' decision is correct, a hospital board controlled by government appointees would be constitutionally free to refuse to hire doctors and nurses who advocate a pro-life position on their private time. In short, if the court of appeals' decision is correct, government can immunize its speech-suppressive actions from First Amendment review simply by laundering them through the shell of a "private" corporation whose board and voting stock are controlled by government.

CONCLUSION

For the foregoing reasons and those set forth in the petition, the petition for certiorari should be granted.

Respectfully submitted,

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